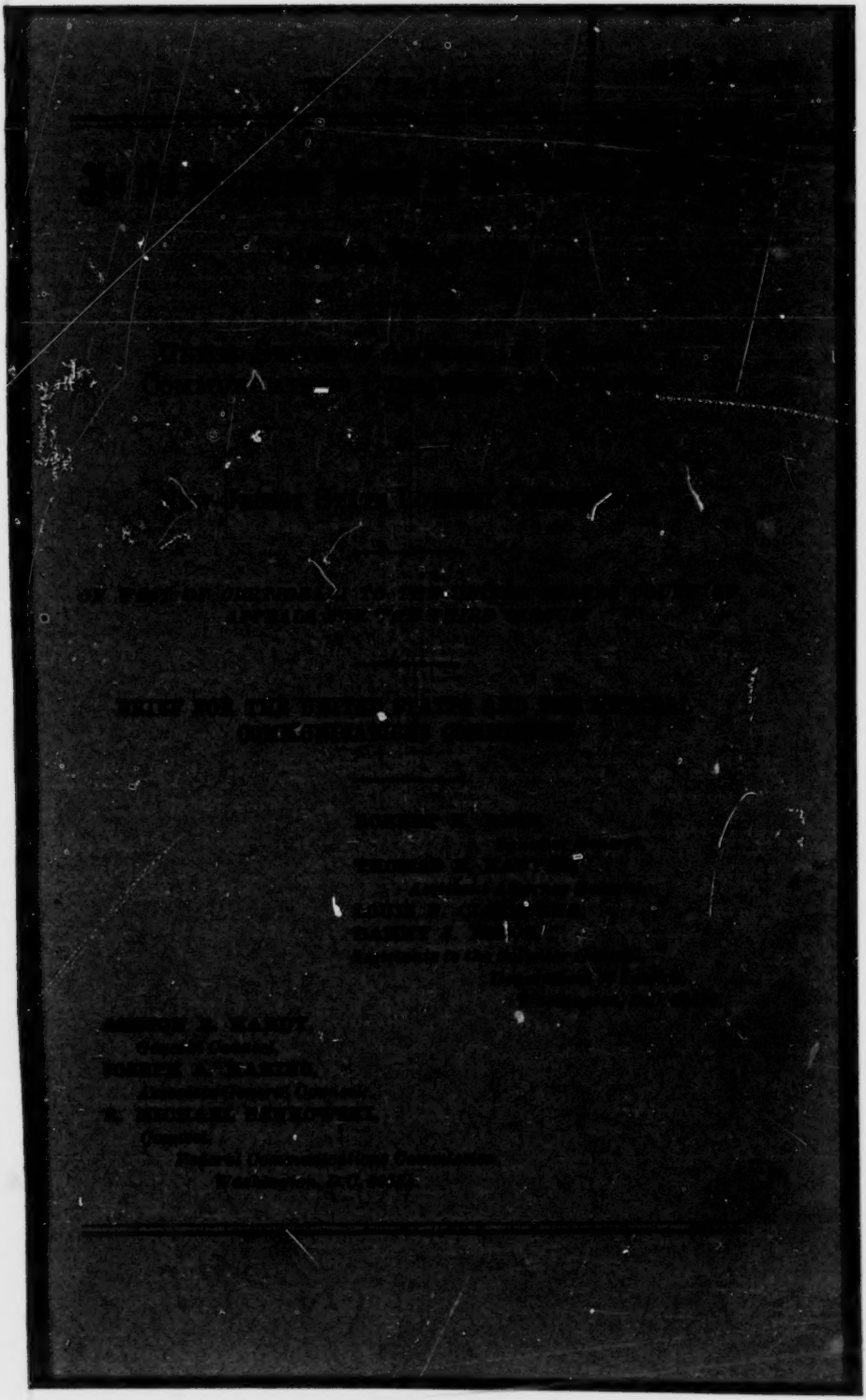

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1471

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

NEW JERSEY STATE LOTTERY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–10a) is reported at 491 F. 2d 219. The Commission's memorandum opinion and order on reconsideration (Pet. App. 13a–26a) are reported at 36 FCC 2d 93. The Commission's original decision (App. 8–11) is reported at 30 FCC 2d 794.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1974 (Pet. App. 11a). A petition for a writ of certiorari was filed on April 2, 1974 and granted on May 28, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prohibition in 18 U.S.C. 1304 against the broadcast of "any * * * information concerning any lottery" or of "any list of the prizes drawn or awarded by means of any such lottery" applies to the announcement during newscasts of the winning number in the New Jersey State Lottery, and is constitutional as so applied.

STATUTES INVOLVED

18 U.S.C. 1304 provides:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * *

47 U.S.C. 326 provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

47 U.S.C. 312 provides:

> (a) The Commission may revoke any station license or construction permit—
>
> * * * * *
>
> (6) for violation of section 1304, 1343, or 1464 of Title 18.
>
> * * * * *

47 U.S.C. 503 provides:

> * * * * *
>
> (b)(1) Any licensee or permittee of a broadcast station who—
>
> * * * * *
>
> (E) violates section 1304, 1343, or 1464 of Title 18,
>
> shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this chapter.
>
> * * * * *

STATEMENT

This case arises on a petition for review of the Federal Communications Commission's determination that weekly broadcasts of the winning number in the New Jersey State Lottery would violate the federal statutory prohibition against the broadcast of "any advertisement of or information concerning any lottery * * *, or any list of the prizes drawn or awarded by means of any such lottery * * *." 18 U.S.C. 1304. The FCC reasoned that the broadcast of the winning number was not essentially a news item of general interest, but, rather, the "dissemination of * * * information * * * reasonably necessary or helpful to the con-

duct of the lottery, and of interest only to that limited class of people who actually hold tickets (App. 10–11). That ruling followed the Second Circuit's previous holding that Section 1304 "prohibits * * * so-called news that directly promotes the Lottery, *e.g.*, broadcasting lists of winners." *New York State Broadcasters Ass'n* v. *United States*, 414 F. 2d 990, 999, certiorari denied, 396 U.S. 1061.

However, on review of the Commission's declaratory ruling, the Third Circuit held that the announcements of the winning number would constitute "unadulterated broadcast journalism—news—and clearly are protected by 47 U.S.C. § 326 [which prohibits censorship by the FCC] and the first amendment rather than prohibited by 18 U.S.C. § 1304" (Pet App. 10a).

1. GENERAL BACKGROUND

Congress first acted in 1827 to deny use of federally regulated communications systems for lottery purposes by prohibiting postmasters from serving as agents for lottery offices and from receiving "lottery schemes, circulars or tickets" free of postage (Act of March 2, 1827, Section 6, 4 Stat. 238). By 1868 the prohibition had been extended to the mailing of "any letters or circulars concerning lotteries" (Act of July 27, 1868, Section 13, 15 Stat. 196). Four years later, Congress passed legislation prohibiting the mailing of letters or circulars concerning illegal lotteries, but the word "illegal" was shortly thereafter stricken (Act of June 8, 1872, Section 149, 17 Stat. 302;

and Act of July 12, 1876, Section 2, 19 Stat. 90). Postal prohibitions were further expanded in 1890 to include newspapers containing "any advertisement of any lottery" (Act of September 19, 1890, Section 1, 26 Stat. 465). Similarly, increasing numbers of state legislatures prohibited lotteries; the last authorized nineteenth century lottery was outlawed in Louisiana in 1893.

The congressional policy of denying lotteries access to federally regulated channels of communications and commerce was continued with respect to the new communications medium of radio. When the Communications Act of 1934 was adopted, Section 316, 48 Stat. 1088, prohibited the broadcast of "any advertisement of or information concerning any lottery". Section 316 was subsequently recodified with editorial changes as 18 U.S.C. 1304.[1]

Congressional and state views towards lotteries coincided into the 1950's. By 1952, 37 states had anti-lottery provisions in their constitutions, and all states had anti-lottery laws. Recently, however, at least eight states have enacted legislation creating authorized

[1] Related provisions of Title 18 include: Section 1301 which prohibits the importing or transporting of lottery tickets; Section 1302 which prohibits the mailing of lottery tickets or related matter; Section 1303 which prohibits the postmaster or employees from acting as a lottery agent; Section 1305 which creates a special exemption for non-profit fishing contests; and Section 1306 which prohibits financial institutions from selling lottery tickets for state-operated lotteries.

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state lotteries.[2] But Congress has not altered its basic policy. In 1967 it prohibited federally financed lending institutions from serving as agents for authorized state lotteries. 18 U.S.C. 1306. As the Second Circuit recently observed:

> Congress long ago stopped differentiating between legal and illegal lotteries, see 15 Op. Att'y Gen. 203–04 (1877); *Commerford* v. *Thompson*, 1 F. 417, 421 (C. C. Ky. 1880); *cf. United States* v. *Fabrizio*, 385 U.S. 263, 87 S. Ct. 457, 17 L. Ed. 2d 351 (1966), and as recently as 1967 enacted a law to prevent federally insured banks and savings institutions from selling lottery tickets for state operated lotteries. See 18 U.S.C. § 1306. There can thus be no doubt that Congress intended to prohibit broadcast of lottery information regardless of the legality of the lottery under local law. [*New York State Broadcasters Ass'n* v. *United States*, 414 F. 2d 990, 996, certiorari denied, 396 U.S. 1061.]

Since that decision, several bills have been introduced before Congress which would exempt state operated lotteries from the proscriptions of 18 U.S.C. 1304. See H.R. 1485, H.R. 1991, H.R. 3503, H.R. 3806, H.R.

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[2] New York (L. 1973, ch. 346, § 19; McKinney's Consolidated Laws of New York Ann., Unconsolidated Laws, § 9541 *et seq.*), New Jersey (L. 1970, ch. 13; New Jersey Stat. Ann., 5:9–1 *et seq.*), Pennsylvania (72 Purdon's Penna. Stat. Ann., § 3761–1 *et seq.*), Michigan (13 Mich. Stat. Ann., § 18.969(1) *et seq.*), Massachusetts (1971 Laws, 813, § 2; Ann. Laws of Mass., ch. 10, § 22 *et seq.*), Maryland (L. 1972, ch. 365, § 1; Ann. Code Md., Art. 88D, § 1 *et seq.*), Connecticut (Conn. Gen. Stat. Ann., § 12–567 *et seq.*), and New Hampshire (N. H. Rev. Stat. Ann., 284:21–a *et seq.*) now have authorized lotteries.

5875, H.R. 6454, H.R. 6536, and H.R. 6668, 93d Cong., 1st sess. However, to date none has been adopted.

2. THE SECOND CIRCUIT'S CONSTRUCTION OF 18 U.S.C. 1304

Since 1969 the FCC has been guided by the Second Circuit's decision in *New York State Broadcasters supra,* the first construction of the meaning of Section 1304's prohibition against the broadcast of "any advertisement of or information concerning" a lottery. The court observed that "[i]n prohibiting the broadcasting of lottery information Congress was not acting in a vacuum; for more than one hundred years a prohibition on conducting a lottery by use of the mail facilities had existed." 414 F.2d at 995.

In the court's view, "[t]he real point here is that we are not primarily in the realm of ideas at all but are chiefly concerned with speech closely allied with the putting into effect of prohibited conduct." 414 F.2d at 997.

Contentions that Section 1304 unconstitutionally inhibited "lawful communication unconnected with the operating of a lottery" were rejected since neither the court nor the Commission believed that Section 1304 should be literally read to prohibit absolutely all "information concerning a lottery":

> The section obviously prohibits a licensed broadcaster from conducting a lottery on the air. But that prohibition alone would be almost meaningless; by its very nature, a lottery could be promoted by broadcasting information about it with essentially the same effect as conducting

> it. It is certainly reasonable that Congress acted to prohibit this possibility—the broadcasting of advertisements and information that directly promotes a particular lottery—and we think that the section must be strictly construed to go no further. [414 F.2d at 997.]

As thus interpreted to preclude broadcasts only of information directly promoting a lottery, the court of appeals held, "section 1304 neither improperly restricts broadcasters to an official government view nor inhibits the free expression of ideas by reason of its overbreadth." 414 F.2d at 997.

In sum, the Second Circuit recognized a distinction between news about a lottery and information which was closely allied with the putting into effect of prohibited conduct—"so-called news that directly promotes the lottery."

3. THE PRESENT CONTROVERSY: FCC RULING

In 1971, Jersey Cape Broadcasting Corp., the licensee of broadcast stations WCMC–AM–FM–TV in New Jersey, sought a declaratory ruling from the FCC as to whether the broadcast of the winning lottery number in the New Jersey State Lottery would constitute a violation of 18 U.S.C. 1304. Its stations had been "bombarded with scores of telephone calls by residents requesting the winning number" because listeners were aware that its Associated Press teletype machines carried the weekly winning lottery number shortly after the drawing (App. 7). To remedy this problem, Jersey Cape proposed to broadcast during

three consecutive newscasts on the day of the lottery drawing the following statement (*ibid*):

> The winning state lottery number drawn today is (and then recite the winning number).

In its opinion, such broadcasts would not directly promote the lottery but rather "inform the listening public of a legitimate news item about which they have a keen interest," and, only "incidentally," would there be any promotion of a lottery (App. 8).

The Commission analyzed Jersey Cape's petition in light of the *New York State Broadcasters* decision and the FCC's previous declaratory rulings on remand.[3] It noted that the Second Circuit had drawn a "distinction between information directly promoting a lottery (prohibited by 18 U.S.C. § 1304) and information which is simply 'news' of a lottery (not prohibited)" (App. 10). Here, the Commission concluded, "[t]he instant proposal does not concern announcements of persons who have won but rather the publicizing of the 'winning number,' the widespread dissemination of such information being reasonably necessary or helpful to the conduct of the lottery, and of interest only to that limited class of people who actually hold tickets" (App. 10–11). Accordingly, a declaratory ruling was issued to the effect that the proposed broadcast would be illegal.

The New Jersey State Lottery Commission sought reconsideration of the decision, arguing that the "'prime effect' of broadcasting the winning lottery number is to inform the public of a bona fide news item in which they are greatly interested, and that

[3] *Lotteries*, 21 FCC 2d 846.

only incidentally is there any promotion of the lottery" (Pet. App. 16a).

The FCC reaffirmed its *Jersey Cape* ruling, stating (Pet. App. 23a):

> We think petitioner's admission that it needs to announce the winning number over the air because it does not have the information necessary to determine the identity of the winner merely serves to reinforce the finding that the broadcasts of the winning number would directly promote the lottery, or as we said in *Jersey Cape,* that the "widespread dissemination" of this information is "reasonably necessary or helpful to the conduct of the lottery."

4. THE THIRD CIRCUIT'S OPINION

In reversing the FCC's ruling, the Third Circuit criticized the agency for taking insufficient account of 47 U.S.C. 326, which denies it any "power of censorship over * * * radio communications" and enjoins it from "interfer[ing] with the right of free speech by means of radio communication." In the court's view (Pet. App. 9a):

> A logical reconciliation of [18 U.S.C. 1304 and 47 U.S.C. 326], and one which avoids a serious constitutional difficulty, restricts the application of 18 U.S.C. § 1304 to promotion of lotteries for which the licensee receives compensation.[4]

[4] In an aside, the court noted, without deciding, that "[p]ossibly * * * some uncompensated promotional announcements outside the context of broadcast journalism might be * * * prohibited by 18 U.S.C. § 1304" (Pet. App. 9a).

Applying this construction, the court held that "it is beyond the competency of any governmental agency to determine, *a priori*, that any item of information is, for any news medium, not news" (Pet. App. 7a). The Third Circuit easily concluded that "[t]he announcements here involved are unadulterated broadcast journalism—news—and clearly are protected by 47 U.S.C. § 326 and the first amendment rather than prohibited by 18 U.S.C. § 1304" (Pet. App. 9a–10a).

SUMMARY OF ARGUMENT

1. Congress intended 18 U.S.C. 1304 to ban announcements such as those in the instant case. It focused explicitly on the distinction between "advertisement" and "information" concerning lotteries, and chose to ban both. It also intended to reach legal as well as illegal lotteries. Finally, with the possible exception of procedural limitations not relevant here, the anti-censorship provisions of 47 U.S.C. 326 were not meant to erect any higher barrier to broadcast regulation than already imposed by the First Amendment.

2. Broadcasting may be regulated in the public interest, and that regulation may extend beyond what would be permissible in a non-licensed medium. In any event, it is ultimately the character of the material transmitted which removes the proposed broadcast from the scope of the First Amendment. The announcement of winning lottery numbers is an integral part of the operation of a suppressible activity. It is not an expression of ideas about any subject, nor does it promote any of the values the First Amendment is designed to protect. The FCC has properly protected such values in holding that documentaries, editorial

comment and other aspects of public discourse of lotteries must be permitted. Its reasonable judgment that the mere recital of a series of digits (having no meaning apart from their role in carrying out the lottery) is not protected should be upheld.

ARGUMENT

There can be no serious doubt that, read straightforwardly, Section 1304 of Title 18 bans the broadcast of a winning lottery number. Whether or not it amounts to communicating a "list of the prizes drawn or awarded by" a lottery, it plainly involves the dissemination of "information concerning [a] lottery." Those unqualified words of the statute, on their face, apparently embrace any broadcast of winning numbers, whatever the purpose or context: no exception is made for a communication of such information when it is unsponsored or is included in a "news" program.

So much, we suppose, is conceded on all sides. The argument is, rather, that Section 1304 cannot be construed literally because to do so would (1) contravene the restrictive legislative intent disclosed in the anti-censorship provisions of 47 U.S.C. 326; and (2) at all events, would offend the Free Speech Clause of the First Amendment. We consider those two objections in turn.

A. LEGISLATIVE INTENT

1. We may quickly dispose of any suggestion that the inclusion of the words "information concerning" in the statutory ban on lottery broadcasts was a slip of the legislative pen. The history of the provision forecloses that contention.

Section 1304 originated as part of a House Bill of 1932 (H.R. 7716, 72d Cong., 1st Sess.), proposing several amendments to the Radio Act of 1927. Among these was a new prohibition (Section 13 of the bill) on the broadcast of "any information concerning any lottery." H. Rep. No. 221, 72d Cong., 1st Sess., p. 7. There was no discussion of the breadth of the ban in the first committee report or during the initial debates on the House floor. See *id.* at 8; 75 Cong. Rec. 3683, 3704. When the bill reached the Senate, however, it was noticed that the proposed radio provision prohibiting the communication of any lottery "information" was wider than the existing statutes affecting the interstate transportation or mailing of newspapers, which only barred "advertisements." See 18 U.S.C. 1301–1302. Accordingly, the Senate rewrote the provision to prohibit only "any advertisement of any lottery." See 76 Cong. Rec. 3767. The committee reports explain that this was done so as to place "radio stations on the same basis as newspapers in connection with broadcasting information as to lotteries." S. Rep. No. 564, 72d Cong., 1st Sess., p. 10; S. Rep. No. 1004, 72d Cong., 2d Sess., p. 12; S. Rep. No. 1045, 72d Cong., 2d Sess., p. 11.

We thus have an express indication that at least one branch of Congress focused on the difference between the two terms "information" and "advertisement." But the story does not end there. When the amended bill returned to the House, it declined to acquiesce in the narrowed Senate version, and the Senate in turn insisted on its amendments. See 76 Cong. Rec. 3915, 3933–3934. The bill went to conference and the

upshot was the present text, including a prohibition on the broadcast of both "any advertisement of" and "any information concerning" a lottery. See H. Rep. No. 2106, 72d Sess., 2d Sess., p. 6; 76 Cong. Rec. 5204. Although the bill failed of enactment because it was pocket-vetoed by President Hoover (see 76 Cong. Rec. 5397), the identical provision became law two years later as Section 316 of the Communications Act of 1934, without further debate. Against this background, it is fair to conclude that the all-embracing prohibition of lottery information broadcasts was the product of a deliberate congressional decision.

2. It may be suggested, however, that Section 1304 was intended to reach only *illegal* lotteries, and is therefore improperly invoked here. Such a contention would be premised on the fact that when the provision was written (1932) and first enacted (1934) lotteries were illegal everywhere in the country. The premise is correct, but the conclusion does not follow.

Unquestionably, those who wrote Section 1304 characterized lotteries as "unlawful practices" (see H. Rep. No. 221, 72d Cong. 1st Sess., p. 8; S. Rep. No. 1004, 72d Cong., 2d Sess., p. 12; S. Rep. No. 1045, 72d Cong., 2d Sess., p. 11), condemned by the laws of all the States (see 75 Cong. Rec. 3683, 3704). No doubt, that consideration removed any hesitation to erect an absolute ban on the broadcast of lottery information. Indeed, it reinforces our submission that the provision should be construed literally. It is not, however, a sufficient reason to conclude that Congress meant to exempt legal lotteries. Even if we had no indication of the legislative attitude, we should be

controlled by the words of the statute—which makes no such exception—not by a guess as to what Congress might have done in a situation not then presented.

But, as it happens, we have strong evidence that no exemption for legal lotteries would have been made. As we have detailed in the Statement, *supra*, pp. 4–6, there had been, for more than half a century, a continuous congressional policy of denying access to federally regulated channels of communications to all lotteries, whether legal or illegal. And see *United States* v. *Fabrizio*, 385 U.S. 263, 267–269. Moreover, as already noted, Congress expressly stated its desire to place broadcasters on the same footing as newspapers with respect to the dissemination of lottery information, and there is no doubt that the ban on publishers reached legal lotteries. *In re Rapier*, 143 U.S. 110; *Ex Parte Jackson*, 96 U.S. 727. Finally, it is instructive that recent efforts to win legislative exemption for state operated lotteries have all failed. See Statement, *supra*, pp. 6–7.

In the absence of any constitutional inhibition (see *infra*, pp. 17–24), the natural inference is that, in enacting Section 1304, Congress was merely extending to the new medium of radio the same hostile attitude toward all lotteries, whether legal or illegal under State law. Until and unless the statute is amended, we must therefore read it as it is written: a general ban on the broadcast of *all* lottery information, subject only to constitutional limitations.

3. It remains to deal with the suggestion that Section 1304 does not mean what it says when read together with 47 U.S.C. 326. That provision, so much

relied upon by the Third Circuit, denies the Federal Communications Commission "the power of censorship over * * * radio communications" and enjoins it from "interfer[ing] with the right of free speech."

The basic flaw in this argument, in light of the legislative history previously recounted, is that Section 1304 postdates the anti-censorship provision. Indeed, what is now Section 326 of Title 47 is carried over unchanged from the Radio Act of 1927 (where it appeared as Section 29, 44 Stat. 1172), and, as we have seen, the lottery broadcast ban was first sponsored in 1932 and not enacted until 1934. Hence, if one provision is deemed to qualify the other, we must treat Section 1304, the later enactment, as controlling.

The fact is, however, that Congress viewed the two provisions as entirely consistent. This is indicated by their appearance on the same page of the House and Senate reports recommending the enactment of the Communications Act of 1934, in which the anti-lottery provision is Section 316 and the anti-censorship provision is Section 326. See S. Rep. No. 781, 73d Cong., 2d Sess., p. 8; H. Rep. No. 1918, 73d Cong., 1st Sess., p. 49. Evidently, with the possible exception of a procedural prohibition (not relevant here) on any censorship activity by the Commission,[5] Section 326 was then thought to announce no more than the obvious caveat that the First Amendment must not be transgressed.

[5] This Court has stated that "the Commission would be remiss in its duties if it failed *in the exercise of its licensing authority*, to aid in implementing [Section 1304], *either by general rule or by individual decisions*." *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 289 (emphasis added; footnote omitted).

And, so far as we are aware, until this case, that has been the prevailing view. See, *e.g.*, *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 382, 389–390; *Columbia Broadcasting* v. *Democratic Comm.*, 412 U.S. 94, 109–110.

At all events, there is no basis here for construing 47 U.S.C. 326 as erecting any higher barrier than the First Amendment. The Commission's ruling in this case does not approach a claim to "the power of censorship over radio communications." It merely recognizes that there is a flat statutory ban on the broadcast of winning lottery numbers, no different in kind than the absolute statutory prohibition on cigarette advertising which this Court has sustained. *Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000, affirming 333 F. Supp. 582 (D.D.C.). If the present ruling contravenes Section 326, it must be because it "interfere[s] with the right of free speech" guaranteed by the First Amendment.

The upshot is that, at least for purposes of this case, Section 1304 reaches to the Constitutional boundary. Except insofar as the First Amendment stands in the way, the statute must be read to prohibit the broadcast of any lottery information, including the disclosure of winning numbers. The case turns, then, on the constitutional question, to which we now address ourselves.

B. CONSTITUTIONALITY

1. There is, of course, no blinking the existence of a potential constitutional issue whenever the freedom to broadcast is circumscribed by government. At the same time, however, it is well settled that the First

Amendment shields broadcasters more narrowly than publishers. See *Red Lion Broadcasting Co.* v. *Federal Communications Commission, supra,* 395 U.S. at 386–390, and cases there cited. One aspect of this difference is illustrated by the contrasting decisions of the Court condoning the imposition of a right-of-reply rule on broadcasters on the one hand (*Red Lion, supra*) and condemning the attempt to enforce a comparable rule against publishers on the other (*Miami Herald Publishing Co.* v. *Tornillo,* No. 73–797, decided June 25, 1974). But more directly relevant to our case is the express statement in *Pittsburgh Press Co.* v. *Human Rel. Comm'n,* 413 U.S. 376, 387, that the decision sustaining the ban on the broadcast of cigarette advertisements (*Capital Broadcasting, supra*) was "not dispositive" of the First Amendment challenge to a legislative prohibition affecting advertisements in a newspaper "[b]ecause of the peculiar characteristics of the electronic media."

It may be that this distinction governs our case, whatever might be the result if a comparable ban were sought to be imposed directly on the press. The broadcaster is subject to more restrictive regulation in the public interest both because of the practical reality that access is necessarily limited (see *Nat. Broadcasting Co.* v. *United States,* 319 U.S. 190, 216–220, 226–227) and because, like the user of the United States mails, he is a mere licensee with respect to a national channel of communication (see, *e.g., In re Rapier,* 143 U.S. 110, 134–135). Within limits, the federal government accordingly has greater power, in-

deed often a duty, to prevent what it deems to be abuse of the broadcast license.

Presumably, these considerations informed the Court's ruling in *Capital Broadcasting, supra.* And it is difficult to appreciate why that decision, approving an absolute ban on the broadcast of advertisements promoting a lawful activity, is not controlling here. To be sure, the present case does not involve paid advertisements. But for reasons articulated below (*infra,* pp. 20–21), we suggest that is immaterial. Nor do we suppose the result in *Capital Broadcasting* would have been different if that case had involved a broadcaster who, for his own private or commercial reasons, had "plugged" cigarette sales without direct sponsorship in defiance of a statute prohibiting such conduct.

2. We do not, however, rest our submission entirely, or even principally, on "the peculiar characteristics of the electronic media." Without ignoring that consideration, we turn to more general principles which, in our view, control the case.

It is of course well settled that, consistently with the First Amendment, even newspapers can be absolutely forbidden to publish certain kinds of information. This is sufficiently illustrated by the Court's ruling in *Pittsburgh Press Co.* v. *Human Rel. Comm'n, supra,* and the examples given in the opinion, "a want ad proposing a sale of narcotics or soliciting prostitutes" (413 U.S. at 388). The same principle must obviously govern with respect to a state law banning advertisements for an illegal lottery—else the States could not effectively outlaw lotteries.

What, then, is the difference between those situations and the present case? Two apparent distinctions emerge: legality v. illegality, and "news" v. advertisement. We shall test each of these arguments in turn.

No doubt, as *Pittsburgh Press, supra,* suggests (413 U.S. at 388), there is less ground for concern when the speech suppressed promotes activity already declared illegal by law. But the illegality of the underlying conduct is neither a sufficient basis for ending the First Amendment inquiry nor does it define the boundary of governmental power. Indeed, no one, we suppose, would argue that discussion of sex discrimination in employment can be barred merely because the practice is unlawful. Nor, *per contra,* is it maintainable that a federal law which forbade broadcasts directly inciting such discriminatory conduct would run afoul of the First Amendment if no other law condemned sex discrimination in employment. Were the rule otherwise, many federal statutes which outlaw use of the mails or interstate communications in furtherance of activities deemed injurious to the public but not elsewhere made illegal would fall. The First Amendment requires no such absurd result. See, *e.g., Capital Broadcasting Co.* v. *Acting Attorney General, supra; Public Clearing House* v. *Coyne,* 194 U.S. 497; *Donaldson* v. *Read Magazine, Inc.,* 333 U.S. 178; *E. F. Drew & Co., Inc.* v. *Federal Trade Commission,* 235 F.2d 735 (C.A. 2), certiorari denied, 352 U.S. 969.

The only conclusion is that the constitutionality of legislation banning speech has little if anything to do

with the legality of the connected activity. The dividing line is elsewhere.

3. What, then, of the asserted distinction between "news" and advertisements? So stated, we submit this is not a sound basis for separating that governmental intrusion which offends the First Amendment and that which does not.

It is now settled that paid or sponsored information is not, for that reason alone, outside constitutional protection. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266; *Pittsburgh Press Co.* v. *Human Rel. Comm'n, supra*, 413 U.S. at 384–388. Nor does it matter whether, although the material is unsponsored, the publisher or broadcaster is activated by the profit motive of attracting a wider audience and thereby a larger circulation and advertisement income. See *Pittsburgh Press Co., supra*, 413 U.S. at 385. But the converse must be equally true: "commercial" or otherwise unprotected speech cannot gain First Amendment immunity merely because it is labelled "news". An editorial decision cannot of itself insulate material from otherwise legitimate governmental control. See *id.* at 386–388.

This, it seems to us, is the main source of the erroneous result reached below. The Third Circuit deemed itself precluded from questioning the broadcaster's characterization of the winning lottery number announcements as "news" (Pet. App. 7a) and accordingly concluded that they involved "unadulterated broadcast journalism" protected by the First Amendment (Pet. App. 10a). Nor is that finding confirmed, as the court below believed, by looking to

the size of the interested audience. Doubtless, in some communities more people would be attracted by information as to where narcotics are on sale than by a discussion of the Constitution. The potential audience for material, in this sense, is simply not the test of First Amendment protection.

4. In the final analysis, we suggest this case is controlled by the character of the material broadcast, the nature of the activity about which information is conveyed, and the proximity of the connection between the two. That is, in effect, the view espoused by the Second Circuit in *New York State Broadcasters Ass'n* v. *United States*, 414 F. 2d 990, certiorari denied, 396 U.S. 1061, which we submit should be followed here.

a. It is, of course, relevant that lotteries, although not everywhere unlawful, may be altogether suppressed. The situation may be quite different with respect to information relating to constitutionally protected rights. Cf. *Mills* v. *Alabama*, 384 U.S. 214. To be sure, the fact that the activity itself enjoys no constitutional immunity does not end the inquiry because the First Amendment protects some discussion of even illegal conduct. But it would make nonsense of constitutional law to hold that a government that wished to suppress lotteries -and was constitutionally free to do so—was powerless to act whenever the activity was conducted or promoted by speech. Thus, a State, or the United States with respect to the District of Columbia, must be able to ban words, written or spoken, in furtherance of a lottery. See, *e.g.*, *Giboney* v. *Empire Storage Co.*, 336

U.S. 490. It follows, *a fortiori,* that the federal government may constitutionally serve the same policy by closing the national airways to lottery promotion.

b. Given an activity which government may properly discourage or outlaw, the next question is whether the speech to be banned is promotional. Here, it seems to us, the test must be objective: labels cannot control. Nor is the issue resolved by the circumstance that the information is not directly sponsored or paid for by the operators of the lottery in this case. And, finally, it is irrelevant how large an audience is attracted. What matters is whether the communication must realistically be deemed an aspect of the activity sought to be controlled, or rather, a discussion or commentary upon it. For the First Amendment protects the exchange of "ideas" (*Red Lion, supra,* 395 U.S. at 390), "debate" (*New York Times* v. *Sullivan, supra,* 376 U.S. at 270), not mere words.

Thus, the FCC has held that documentories, editorial comment, panel discussions and interviews about lotteries are not prohibited, "even if the broadcast 'has the incidental effect of promoting a lottery' ". *Lotteries,* 21 FCC 2d 846. Here, on the other hand, the Commission has concluded that the announcement of winning lottery numbers, meaningless to all but the participants (in contrast to superficially similar announcements of such numbers as sports scores or market quotations), is effectively an ingredient of the lottery operation which is reached by Section 1304. That judgment, we submit, is entirely reasonable and ought not be disturbed.

c. We recognize that there may be other cases in which it is difficult to separate promotional speech

from idea communication once we apply Section 13(
to more than the pedestrian "commercial". Neverth
less, we urge the Court to repudiate the artifical lin
announced below. At least, in this case, it seems to u
plain that the mechanical recitation of numbers, whic
merely promotes an unprotected activity without com
municating any opinion or idea, or, indeed, conveyin
anything whatever to the general public, cannot enjo
the shield of the First Amendment. The Constitutio
has more important uses.

Accordingly, we submit as correct the Commission'
ruling that Section 1304 does not overstep the constitu
tional boundary in prohibiting the broadcast of winnin
lottery numbers.

CONCLUSION

For the foregoing reasons, it is respectfully sub
mitted that the judgment of the court of appeal
should be reversed.

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